

The Torrens Law — An Argument For It

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FOREWORD

I have prepared this pamphlet in the hope that I could bring before the public the principal objectives of the system of land title registration, illustrate its functioning and compare it with the recording system, to the end that this information will bring about a familiarity with registration, a realization of its advantages and a general utilization of the machinery it provides.

I wish to acknowledge my indebtedness and gratitude to Mr. John J. Clarke, my assistant, and to Mr. A. N. Gitterman, for the assistance they have given me in this work.

W. P. B.

January 15, 1937.

INTRODUCTION

It is well known that Sir Robert Richard Torrens, an Irishman living in South Australia, first conceived the system of land registration which he based upon the system of ship registry. His idea found form in an act of the South Australian legislature in 1858. This first land title registration law is found today to have four branches, the Australian, Canadian, English and American. It is with the last that we are now concerned, particularly as found in the statutes of the State of New York (Real Property Law, §§ 370-435).¹

¹ The Torrens system has been embodied in the statutes of: California, Colorado, Georgia, Illinois, Massachusetts, Minnesota, Mississippi, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Utah, Virginia, Washington. Also Hawaii, Philippine Commonwealth, Puerto Rico.

FUNDAMENTAL PRINCIPLE

Registration vests in the owner the same kind of title as does recordation, but the title is established by registration on a new base, beyond which no bona fide transferee for value need go. In Great Britain registration proceedings are regarded as resulting in a conveyance from the transferor to the Crown, and from the Crown to the transferee,² all blots on the title other than interests registered thereon being, by that fact, expunged. No transfer of a registered title is effective until there has been a compliance with the statutory requirements; until then the transferee has only the right to register a title. Under the recording system the deeds are essential links in the chain of title—recording does not cure any defects inherent in the deeds. Registration eliminates the chain of title by establishing, on each transfer, a new base title.

THE MECHANISM OF REGISTRATION

The procedure by which title is registered has been succinctly set forth by Judge (now Justice) Cardozo.³

"The statute provides for the filing of a petition (§ 379); for a reference to an official examiner who is to make a preliminary report as to the title and as to any interests therein (§ 380); and for a hearing thereafter at which adverse claimants shall have an opportunity to assert their rights (§ 385). Notice of this hearing is to be given by publication in a newspaper, and by registered letter, demanding a return, to every party to the proceeding whose address is known, and so far as possible to all other persons appearing to have an interest therein as well as to adjoining owners. Notice of the proceeding and hearing is also to be posted in a conspicuous place upon the land (§ 385). The final order when duly enrolled is to be 'forever binding and conclusive upon the State of New York and all persons in the world, whether mentioned and served with the summons and said notice specifically by name, or included in the description, "all other persons, if any, having any right or interest in, or lien upon, the property affected by this action or any part thereof."'" (§ 391)."

² Kerr—*The Australian Land Titles (Torrens) System* (1927).

³ *City of New York v. Wright*, 243 N. Y. 80, 83.

ESTATES REGISTERED

Any estate in land may be registered but it is provided that "no title to a mortgage, lien, trust, charge or estate less than a fee simple shall be registered unless the title to the legal estate in fee simple in the same property is first registered."⁴

THE MECHANISM OF SUBSEQUENT TRANSFER

When title has been registered a certificate of title is prepared by the registering officer who issues a duplicate to the owner.⁵ When the owner wishes to transfer title he executes a deed to the grantee. The grantee takes the deed and the duplicate certificate to the registrar who thereupon issues a new certificate and duplicate.⁶ The state of the title is at all times apparent from an inspection of the original certificate of title. A transferee of a registered title need have regard only for the certificate, and the identity and capacity of the seller.

Where there is a judicial sale of real property, title to which is registered, the court designates an official examiner to examine and report as to the regularity of the proceedings since the last registration. If this report is favorable the court approves the deed and directs the registrar to register the title accordingly. The fee of the official examiner for his services is \$5.00 unless the court otherwise directs.⁷

Upon the death of an owner, his heirs or devisees, at any time after the granting of letters testamentary, or letters of administration, may petition the court for an order prescribing the name or names and the manner in which the title shall be registered. After notice and hearing, the court enters the appropriate order and a new certificate is issued.⁸

This certificate contains a memorial reciting the circumstances of its issuance. After the settlement of the personal estate, or after the expiration of the time limited by law for the disposition of the real property of a decedent by sale, mortgage or lease,⁹ the heirs or devisees may apply for a cancellation of the memorial.¹⁰

This, in short, is the method of registration and transfer as found in our New York statutes.

⁴ R.P.L. § 378;

⁵ R.P.L. § 396;

⁶ R.P.L. § 406;

⁷ R.P.L. §§ 420

⁸ R.P.L. § 423

⁹ Surr. Ct. Act §§ 233 *et. seq.*

¹⁰ R.P.L. § 424

It is now my purpose to compare registration with recordation in light of the postulated features of an ideal conveyancing system, which have been stated to be security, simplicity, accuracy, cheapness, expedition and suitability to circumstances.¹¹

1. SECURITY

The fact that title insurance is found to be necessary is in itself sufficient commentary on the security afforded by the present recording system. The purpose of title insurance is to afford the holder assurance that if some latent or undiscovered effect in his title comes to light, he will have recourse to pecuniary compensation. Title insurance companies now fill this need and we find that they, as might be expected, are the most vociferous opponents of the registration system. It has been stated by a title company pamphleteer that the registration system is "inimical to and in conflict with our American ideals and * * * will never harmonize with our institutions."¹² The proponents of registration need not rely on flag-waving to prove its merits.

The security afforded by registration is two-fold. The make-up of the system is such that errors are rare and the owner is protected in the rare event by an assurance fund.

The assurance fund is ancillary to the functioning of registration. It provides, in New York, for the payment by the initial registrant of 1/10 of 1% of the assessed value of the property. At present each county has its own fund made up of payments in connection with registrations in that county. Any person who, without fault, sustains loss by reason of fraud, negligence, etc., has a cause of action against the custodian of the funds (County Treasurer or City Chamberlain in New York City). The liability of this official is co-extensive with the size of the fund, as it exists when the claim is allowed or judgment rendered, or as it subsequently accrues. Under the State Constitution, Article VIII, Section 10, no liability could be imposed on or assumed by the county, for any claim or judgment in excess of the assurance fund.¹³

Moreover, a history of the American Torrens Law shows that it is safe. In Hawaii, for instance, no losses occurred in thirty years and the

¹¹ Sir Charles Fortesque—Brickdale—*Methods Land Transfer*.

¹² John L. Finck—*The Torrens Fallacy* (1935).

¹³ Opinion of Attorney General. 19 St. Dept. Rept. 357 (1919).

assurance fund was abolished.¹⁴ In Cook County, Illinois, from 1926 through the first six months of 1936 the following transactions occurred:

Initial registrations, No. 4038. Value, \$36,149,201.

Real Estate Transfers, No. 124066. Stated Consideration, \$74,136,722.

Trust Deeds and Mortgages, No. 94626. Stated Consideration, \$458,528,892.

The system has there been in operation since 1897. The total losses to Sept. 1 1936 were \$17,035.08. The assurance fund at that time amounted to \$448,419.53, from which there is an annual investment income of \$15,680, almost enough to pay all the losses of 40 years of operation, during which there were nearly a quarter million transactions involving well over a half billion dollars.

2. SIMPLICITY

In 1908, a commission appointed by Gov. Hughes to examine the Torrens system reported that the system of recording "grows more cumbersome as it becomes older, and, in spite of efforts to make it less burdensome, is tending to break down of its own weight. The multiplication of records, the complication of titles, and the repeated expense of re-examination and the delays incident thereto should be avoided, if any feasible method of doing so can be devised."¹⁵

The statute drawn and submitted by this Committee became the basis for our present law.

It is apparent that the statement of Register Hopper of New York County made in 1915, is even more pertinent today. He said:

"Today there are over 2,000,000 instruments recorded. There are about 100,000 lots in New York County so that on the average there are about 20 instruments which make up the title to each lot. To find the particular 20 instruments affecting a given lot out of the 2,000,000 on record is the object of title 'searching' * * *."¹⁶

¹⁴ N. Y. World-Telegram—April 20, 1936.

¹⁵ "Report of the Committee appointed by his Excellency Governor Charles E. Hughes, pursuant to Chapter 628 of the Laws of 1907, to examine the system of registering titles to real property known as the Torrens system and to report, etc."

¹⁶ A statement and Report showing the purposes of the office and changes and improvements made during 1914, by John Hopper, Register.

Does anyone suppose that it is simple to search title where there may be one or more unrecorded instruments in the chain of title? Many of the title companies, after uncovering defects, obtained correcting instruments, did not record them, and used them to exact tribute from every purchaser or encumbrancer of the title. It has been estimated that a large number of these instruments exist affecting metropolitan realty.

Contrasted with this confusion of recorded and unrecorded instruments and the doubt cast upon titles, is the simplicity of registration. The steps have been stated, and the ease of transfer noted.

3. ACCURACY

The requisite of accuracy in a conveyancing system is connected with the feeling of security which the transferee should feel that he has, beyond dispute, what he purchased.

If the registrant and his grantee obtain an unimpeachable title, then no argument can be made against the accuracy of registration. At the end of 30 days the judgment of registration becomes final (except for fraud) unless meanwhile appealed from. It then binds everyone in the world. If fraud has been perpetrated by the registration the defrauded party must act within 10 years to set aside the registration. But this does not mean that the title is in suspense for a number of years. The intervening rights of an innocent purchaser or encumbrancer for value cannot be disturbed. If it is found that a fraud has been committed, and those rights have intervened, the victim of the fraud has recourse to the assurance fund.

It is frequently claimed that there is such lack of finality to a registration, as to destroy all pretensions of accuracy. The most frequently cited instance is exemplified by those where the Appellate Division of the Supreme Court has held that failure to name and serve necessary parties required a dismissal of the proceedings and a denial of the registration.¹⁷ It is noteworthy that these cases were decided on direct appeal from the judgment of registration. Thus the title has not become final by registration, for the 30 days had not expired. On the other hand, where the judgment has become final, the certificate is conclusive.¹⁸ In the Wright case the action was for ejectment, and

¹⁷ Sherman v. Cannan, 169 A. D. 17; Belmont Powell Holding Co. v. Serial B. L. & Inst., 167 A. D. 124; City and Suburban Homes v. People, 157 A. D. 459.

¹⁸ City of New York v. Wright, 243 N. Y. 80 (1926); Floral Park Mutual Fuel Co. v. Fiske (1926), 128 Misc. 349; Terry v. Collins (1932) 146 Misc. 483; Rubin v. Smith (1923) 122 Misc. 5; aff'd 210 A. D. 876; Smith v. Martin (1910) 69 Misc. 108.

the defense registration of title in the defendant. The Court rejected the plaintiff's contention that the certificate was not final, saying:

"Certificates of registration would be worthless if their effect could be undone by evidence that an outstanding right or interest has been misapprehended or omitted. The very purpose of the proceeding is to set such controversies at rest."

The Supreme Court of the United States has said too,¹⁹ quoting with approval the language of *Ballard v. Hunter*, 204 U. S. 241:

"It is said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the County show that she was an owner thereof. But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem*, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it."

The New York Registration Act provides that the proceedings shall be *in rem*. The final order is to be forever binding and conclusive upon the State of New York and all persons in the world whether mentioned and served with the summons and said notice specifically by name, or included in the description "all other persons, if any, having any right or interest in, or lien upon, the property affected by this action or any part thereof."

The New York registration act formerly demanded that a copy of the notice of proceeding be sent by registered letter "demanding a return." In *Matter of Harper*²⁰ the addressee did not personally sign the return, as a result of which registration was denied. The legislature in 1926 altered the law so as to require that notice be sent by registered letter demanding a "personally signed receipt card."²¹

However, Judge Cardozo said of this in *City of New York v. Wright*, which was decided by the Court of Appeals in 1926:

"The requirements of the law were satisfied when the notice duly registered, with due demand for a return, was deposited in the mails."

Other cases are also cited by opponents of registration to demonstrate alleged deficiencies in the operation of the statute. In all of these cases opposition to the registration was voiced *in the proceeding*, and for a defect in proof (such as the elements of adverse possession) or for a

¹⁹ *American Land Co. v. Zeiss*, 219 U. S. 47; 55 L. Ed. 82.

²⁰ 106 Misc. 514.

²¹ Laws 1926, Chapter 270.

failure to comply with the statute as respects some procedural requirement, registration was denied.²² These were not cases, however, as is sometimes implied, where a certificate was issued and later title was upset.

The fact that these cases exist is a fresh demonstration that no ill-founded claim for registration can succeed. It must be remembered that the primary purpose of registration is not to make new rules of substantive real estate law, but to provide a new technique to effect transfers and make them permanent and unassailable.

The uncovering of dubious claims, the establishment of legal rights, and the extirpation of pretended titles, are the inevitable results of registration. The Court is the ultimate arbiter of title under any system of conveyancing. It is required, in registering title, to scrutinize the proof carefully. If the plaintiff establishes his claim, he is rightly entitled to an adjudication that the title is his.

There exists in New York no decision which upholds a collateral attack on a final judgment or final order of registration.

As was said by Judge Collin:

"The judgments rendered in the actions are well nigh conclusive throughout the future as against all the world * * *."²³

Mr. Finck (*op. cit.*, p. 9) states the position of the opponents of registration that

"the decree of registration is binding only upon those who are made parties to the proceeding and can be set aside by anyone over whom the court did not acquire jurisdiction. It is therefore necessary on every subsequent sale or mortgage * * * to make a complete re-examination of the title * * *."

The statute negatives this claim.

Section 391 of the Law now provides in part:

"The judgment and any order made and entered in a proceeding under this Act shall, except as herein otherwise provided, be forever binding and conclusive upon the State of New York and all persons in the world, whether mentioned and served with the said notice specifically by name, or included in the description, 'all other persons, if any, having any right or interest in, or liens upon, the property affected by this proceeding, or any part thereof.' It shall not be an exception to such conclusiveness that any such per-

²² *Crabbe v. Hardy*, 77 Misc. 1; *Meighan v. Rohe*, 166 A. D. 175; *Jamieson & Bond Co. v. Reynolds*, 174 A. D. 78; *Eldert v. Cross Country Railroad Co.*, 88 Misc. 684.

²³ *Barkenthien v. People*, 212 N. Y. 36; 44.

son is an infant, lunatic, or is under any other disability or is not yet in being."

The decision in the Wright case establishes the validity of the statute.

The case of Smith v. Avener, a case in the Rockland County Supreme Court is advanced by Mr. Finck (*op. cit.*) for the holding: "upon the trial of the action a judgment was entered holding the registration invalid because the true record owner of one of the parcels had not been named or served in the registration proceeding."

Mr. Walter Fairchild²⁴ in discussing this case²⁵ has the following comment to make:

"The Court did not declare the Avener registration invalid but on the contrary held that it was valid. There was no trial of the action. The fact appeared that there was a double description in the original registration judgment and certificate by which the registered lot was designated by a record description and also by a survey description which covered the adjoining lot. The Court with the consent of the registered owner, Avener, entered an order which corrected the description in the certificate so that it properly referred only to the lot which was registered and held that the registration certificate was valid and binding with respect to that lot * * *."

Thus, the opponents of registration, in the enthusiasm of argument, sometimes err.

After registration has been accomplished, the certificate reflects accurately the state of the title.

The certificate recites whether or not the owner is married and whether under a disability;²⁶ it must show any judgments which are liens against the property;²⁷ No encumbrance of any kind not noted on the certificate attaches to registered real property except:

Liens in favor of the United States;

New tax liens;

Leases made after registration for a period of less than 1 year;

Easements or servitudes accruing so as not to require registration.

Neither prescription nor adverse possession avails against a registered title.²⁸

²⁴ President Torrens Title League.

²⁵ "The Devil was sick—" (1936).

²⁶ R.P.L. § 394.

²⁷ R.P.L. § 417. The judgement does not constitute a lien unless it is so noted whereas under the recording system the mere docketing of a judgment establishes the lien.

²⁸ R.P.L. § 401.

4. CHEAPNESS

The recording system suffers in comparison with the registration system when the cost is considered.

Based on a \$10,000 valuation the costs of registration are:

Assurance fund	\$10.00
Title examination	30.00
Advertising costs	15.00
Filing and docket fees	15.00
Title certificate	5.00
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	\$75.00

A new certificate costs \$5.00.

On the other hand the prospective purchaser of property must wait now about 30 days for a policy of title insurance, pay much more in fees and get a policy studded possibly with exceptions and having only the value of the guarantor's solvency behind it. On a resale of a guaranteed title a new policy must be issued; each policy being personal to the policy holder.

5. EXPEDITION

No argument is needed to demonstrate the superiority of registration as respects expediency of subsequent transfer. All the formalities of transfer may be accomplished in a single day. The owner hands a deed with his duplicate certificate to the purchaser, who then goes to the Register's office. The new certificate is immediately issued. Few transactions requiring title policies can be closed in fewer than 30 days.

6. SUITABILITY TO CIRCUMSTANCE

The proceeding being in equity the court in ordering registration may make such order as equity requires; clouds on title may be removed, and the priority among liens fixed.²⁹ Any matter as to which the parties or the registrar is in doubt, may be referred to the Court.³⁰ Thus we find a fluid medium for registration, which does not sacrifice safety for speed and at the same time can so be moulded as to do justice to all.

Recording once accomplished, is static and requires a new act of the parties to correct deficiencies. Mistakes may remain unnoticed for decades. Registration brings all these matters into sharp relief while the operation of transfer in a state of flux, when the parties are before the Court, and at a time when inadvertent errors can be easily adjusted.

²⁹ R.P.L. § 390.

³⁰ R.P.L. § 422.

REASON FOR NON-USER OF REGISTRATION

It might be supposed that any system presenting such attributes of desirability would receive popular support. The contrary is true.

"This system of registration has had a somewhat anaemic and precarious existence during the 35 years of its American life."³¹

In his annual message to the New York State Legislature in 1937, Governor Lehman said:

"While this system has been on our statute books for twenty-five years, its use has been very limited. Yet its essential merits and great advantages are evident. The Legislature should undertake to improve the system to expand its availability."

The highest percentage of user has occurred in Cook County, Illinois where 20% of the area of the county is registered. In many states the act is dormant; in others only certain types of land have been registered. Many reasons have been advanced for the failure to take advantage of the statute.

The reasons most frequently advanced are:

1. Ignorance of law by owners and attorneys.³¹
2. Cost of original registration.³¹
3. Opposition of mortgage loan, title insurance and abstract companies³² taking the form of adverse publicity, refusal to grant loans on, or insure Torrens Titles, and lobbying against any effective reforms.
4. Delay attendant upon initial registration.

THE FUTURE OF REGISTRATION

There can be no doubt that the future of land title registration is in the hands of the legal profession. Only by understanding, recommending and utilizing the Torrens System can attorneys persuade the public of its real place in our jurisprudence; break down the stubborn resistance of title companies and others who would suffer by the general instatement of registration in our conveyancing system; and assist in the correction of any technical faults which a more intensive experience may reveal in the system. I am attaching a short statement of desirable changes in the act together with my reasons therefor.

³¹ McCall-Torrens System after 35 years, 10 N.C.L. Rev. 329 (1932).

³² McCall—op. cit.; Report of Torrens Land Title League (July 31, 1935). However, at a hearing before the N. Y. Senate Judiciary Com. March 12, 1935, representatives of the New York Life Insurance Company, Prudential Insurance Company, and others stated that loans had been placed in various states on small homes, titles to which were registered.

Attorneys should realize that at present there are few practitioners who know of, much less understand, land title registration. The advocacy of registration by attorneys will undoubtedly reward participants in satisfactions in rendering a distinct public service, and will increase the esteem in which they will necessarily be held by the public. The field is uncrowded and rich. It remains for the far sighted attorney to reap it.

PROPOSED AMENDMENTS TO THE LAW

1. UTILIZATION OF TITLE PLANTS

Title Companies, in the course of their business have built up extensive title plants, which are designed to, and do, facilitate their examinations of titles in connection with title insurance. It is my belief that these title plants should be made available for the purpose of registration. This can be accomplished by giving the title companies the privilege of qualifying as official examiners of title under the statute. The labor and the wealth of real estate experience which necessarily have been poured into the perfection of these plants, can thus be made available to the public. Of course, once a title has been registered, the usefulness of the plant as to that title practically comes to an end. But this is, in my opinion, the only way to avoid a great and regrettable economic waste,⁸⁸ for I am convinced that registration must inevitably succeed recordation as a means of conveyancing.

2. CENTRALIZATION OF ASSURANCE FUND AND STATE GUARANTY OF TITLES

The transfer of the County funds to a state assurance fund seems to me desirable. It increases the gross security for titles in the state, and makes the fund easier of administration. There are 62 counties in the State. If all of the officers now charged with the custody of the funds transfer them to a single state officer such as the comptroller, the saving and efficiency possible need no brief from me to support them.

Much agitation has been heard in recent days to put the credit of the state behind these registered titles, thus constituting the state in effect a guarantor of the titles. It is the prevalent opinion that an amendment to the Constitution would be necessary to accomplish this result. Such an amendment would do much to promote confidence in registered titles. As above noted, the assurance fund is ancillary to the functioning of registration. It seems safe to say that no drain on the state treasury would follow the placing of state credit behind registered titles. The experience in other jurisdictions leads me

⁸⁸ New York Title Insurance Company for instance values its title plant at \$600,000. (August 31, 1936).

to say that the net result would be an increased and beneficial user of registration.

3. COMPULSORY REGISTRATION

There has been a marked movement in late years, to make registration of land titles compulsory. The present law is only mildly so, requiring that no estate less than a fee simple shall be registered unless the fee title be first registered.³⁴ But this requirement has no practical effect in promoting the use of registration. The causes herein noted discourage the employment of a worthwhile conveyancing system. It is my feeling that compulsion in registration, while it may smack to some of regimentation, is nothing more than pump-priming. By using the registration law in every case in which there is a voluntary transfer for value of an estate in fee simple, those now ignorant of the law, or unwilling to use it, will become convinced through experience that it has many advantages over the recording system that the use of registration will come to be desired in all transfers. Immediate compulsion would, for many reasons, be unwise. I suggest that a time be fixed—say three to five years hence, after which transferees of the titles above noted, must register them to give them validity against subsequent innocent purchasers for value. Later the application of this rule can be extended to all other transfers.

³⁴ R.P.L. § 378.